Supreme Court, U.S.
FILED
MAY 24 1991
OFFICE OF THE CLERK

No. 90-1497

In the Supreme Court of the United States

OCTOBER TERM, 1990

ASHKENAZY PROPERTY MANAGEMENT CORPORATION, d/b/a L'ERMITAGE HOTEL, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

LAURENCE S. ZAKSON
Attorney
National Labor Relations Board
Washington, D.C. 20570

16p

QUESTIONS PRESENTED

1. Whether the D.C. Circuit correctly applied the law of the case when it followed a Ninth Circuit decision, issued at an earlier stage of the proceeding, that prohibited the National Labor Relations Board from conditioning awards of backpay on showings that the victims of an unfair labor practice were legally entitled to be present in the United States during the backpay period.

2. Whether an individual is required to prove that he was legally entitled to be present in the United States in order to receive an award of backpay.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	5
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Bevles Co. v. *Teamsters Local 986*, 791 F.2d 1391 (9th Cir. 1986), cert. denied, 484 U.S. 985 (1987)	8
Caamano Bros., 275 N.L.R.B. 205 (1985)	8
Christianson v. *Colt Indus. Operating Group*, 486 U.S. 800 (1988)	6
Del Ray Tortilleria, Inc., 302 N.L.R.B. No. 45 (Mar. 27, 1991)	9
EEOC v. *Hacienda Hotel*, 881 F.2d 1504 (9th Cir. 1989)	8, 10
Felbro, Inc., 274 N.L.R.B. 1268 (1985), rev'd, 795 F.2d 705 (9th Cir. 1986)	8
INS v. *Lopez-Mendoza*, 463 U.S. 1032 (1984)	7
Local 512, Warehouse & Office Workers' Union v. *NLRB*, 795 F.2d 705 (9th Cir. 1986)	3, 8
Patel v. *Quality Inn South*, 846 F.2d 700 (11th Cir. 1988), cert. denied, 489 U.S. 1011 (1989)	8
Rios v. *Enterprise Ass'n Steamfitters Local 638*, 860 F.2d 1168 (2d Cir. 1988)	8, 10
Sure-Tan, Inc. v. *NLRB*, 467 U.S. 883 (1984)	3, 7
United Steelworkers v. *NLRB*, 377 F.2d 140 (D.C. Cir. 1966)	6

Statutes and regulations:

Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*	8

Statutes and regulations—Continued: Page

Immigration and Naturalization Act, 8 U.S.C. 1101 *et seq.* 7
Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, Tit. I, 100 Stat. 3359 (8 U.S.C. 1324a *et seq.*) 4
§ 101(a)(3)(B), 8 U.S.C. 1324a note (100 Stat. 3372) 10
§ 274A, 8 U.S.C. 1324a(a) 10
National Labor Relations Act, 29 U.S.C. 151 *et seq.*:
§ 8(a)(1), 29 U.S.C. 158(a)(1) 2
§ 10(f), 29 U.S.C. 160(f) 4
8 C.F.R. 274a.2 9
29 C.F.R. 102.52 *et seq.* 3

Miscellaneous:

Department of Labor, Public Memorandum, GC 88-9 (Oct. 27, 1987) 8-9

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1497

ASHKENAZY PROPERTY MANAGEMENT CORPORATION, d/b/a L'ERMITAGE HOTEL, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6-14) is not reported, but is noted at 917 F.2d 62 (Table). The supplemental decision and order of the National Labor Relations Board (Pet. App. 15-59) are reported at 293 N.L.R.B. No. 114. An opinion of the United States Court of Appeals for the Ninth Circuit issued at an earlier stage of the proceedings (Pet. App. 60-61) is reported at 817 F.2d 74. The Board's decision and order in the underlying unfair labor practice proceeding are reported at 268 N.L.R.B. 744. The Ninth Circuit's memorandum opinion enforcing that order is not reported, but is noted at 796 F.2d 479 (Table).

JURISDICTION

The judgment of the court of appeals (Pet. App. 6-7) was entered on October 30, 1990. On January 22, 1991, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including February 28, 1991. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The National Labor Relations Board awarded backpay to 16 employees who were discharged because of protected union activities. Their employer argued that the backpay award should be reversed because it was not allowed, during the backpay hearing, to inquire into whether any of the employees were aliens who were not legally entitled to remain in the United States. The D.C. Circuit held that a prior Ninth Circuit decision in this case was the law of the case on that question, and it affirmed the backpay award.

1. In the underlying unfair labor practice proceeding, the Board found that petitioner Ashkenazy Property Management Corp. violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by discharging the employees in its housekeeping department because of the employees' concerted activities.[1] The Board ordered petitioners, among other things, to offer the employees reinstatement and to make them whole for any loss of wages and benefits resulting from their unlawful discharge.

---

[1] In subsequent proceedings, Ashkenazy Property Management Corp. and the other petitioners conceded that they were "joint employers" responsible for any backpay award. See Pet. 4 n.1.

Ashkenazy Property Management Corp., 268 N.L.R.B. 744 (1984), enforced mem., 796 F.2d 479 (9th Cir. 1986) (Table).

2. The Board's regional director then instituted a proceeding to fix the amount of the backpay to be awarded to the employees. See 29 C.F.R. 102.52 *et seq.* In preparing the backpay specification, the regional director instructed each employee to furnish proof that he or she was legally entitled to be present in this country. The charging party in the unfair labor practice proceeding, Hotel Employees and Restaurant Employees and Bartenders Union, Local 11, AFL-CIO, objected to that requirement. It filed a motion with the Ninth Circuit seeking to compel the Board to conduct the backpay proceeding in accordance with *Local 512, Warehouse & Office Workers' Union* v. *NLRB*, 795 F.2d 705 (9th Cir. 1986) (*Felbro*). Pet. App. 8.

In *Felbro*, 795 F.2d at 715-723, the Ninth Circuit had held that aliens who were actually present in the United States during the backpay period were entitled to relief regardless of whether they were legally entitled to remain in this country. The court distinguished this Court's decision in *Sure-Tan, Inc.* v. *NLRB*, 467 U.S. 883 (1984), on the ground that *Sure-Tan* involved workers who had been voluntarily deported and were thus not present in the United States during the backpay period. *Felbro*, 795 F.2d at 717.

In response to the union's motion, the Board's General Counsel advised the Ninth Circuit that further proceedings in this case would be conducted in a manner consistent with *Felbro*. Petitioners did not appear in the Ninth Circuit to object to that course. The Ninth Circuit denied the union's motion in reliance on the General Counsel's representation. Pet. App. 60-61. The court left no doubt, however, that it considered the Board to be bound by *Felbro*. The Ninth Circuit criticized the General Counsel for acquiescencing in *Felbro* only for purposes of this case, and it indicated

that it was prepared to fashion a remedy for any future "violation of the rule of law." *Id.* at 61.

3. a. In accordance with the General Counsel's representation to the Ninth Circuit, the ALJ conducting the backpay hearing refused to allow petitioners to explore the employees' immigration status. However, petitioners were "permitted to inquire, in order to determine the discriminatees' continued availability for work, whether they ha[d] been outside of the United States during any portion of the backpay period." Pet. App. 34-35.

b. On review of the ALJ's decision, the Board rejected petitioners' contention that the ALJ should have permitted inquiry into the employees' immigration status. Pet. App. 22-23 n.1. The Board explained that the General Counsel "was required [by *Ashkenazy II*] to proceed on a backpay specification consistent with [*Felbro*] with respect to backpay entitlement of employees who are undocumented aliens." *Id.* at 22 n.1. The Board also noted that the employees in question had all been hired prior to the effective date of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. 1324a *et seq.*, and were thus unaffected by that Act's prohibition on the employment of illegal aliens. Pet. App. 23 n.1.

The Board ordered petitioners to pay seven named employees a total of $58,359.64 in backpay plus interest. In addition, petitioners were ordered to pay a total of $18,335.79 into escrow for the benefit of nine employees who were unavailable at the time of the hearing. Pet. App. 20-21.

c. Petitioners sought review of the Board's order in the D.C. Circuit.[2] In an unpublished decision, the D.C.

[2] The NLRA authorizes an employer aggrieved by an order of the Board to seek review in the circuit where the unfair labor practice occurred, the circuit in which the employer resides or transacts business, or the D.C. Circuit. 29 U.S.C. 160(f).

Circuit found that the Ninth Circuit's decision in *Ashkenazy II* was the law of the case with respect to whether backpay should be limited to employees legally entitled to be present in this country. Pet. App. 9-12. Under the law of the case rule, the court explained, "a legal decision made at a prior stage of litigation, unchallenged by subsequent appeal, is binding on subsequent stages of the litigation." *Id.* at 9-10. Application of the doctrine is particularly appropriate, the court added, where, as in this case, "a party brings a previously decided issue before a second forum, in an attempt to 'forum shop' for a second opinion." *Id.* at 10.

The D.C. Circuit added that the law of the case rule would not obligate it to honor the Ninth Circuit's decision in *Ashkenazy II* if the Ninth Circuit's decision were "clearly erroneous" or would "work a substantial injustice." Pet. App. 11. But the D.C. Circuit found that the Ninth Circuit's decision was not clearly inconsistent with this Court's decision in *Sure-Tan* and that the application of *Felbro* to this case would not work a substantial injustice. Accordingly, the court upheld the backpay award. Pet. App. 12.

ARGUMENT

Petitioners argue that the D.C. Circuit misapplied the law of the case rule, and they seek further review of whether *Sure-Tan* limits backpay awards to those employees who can demonstrate that they are legally entitled to remain in the United States during the backpay period. In our view, the D.C. Circuit did not err in its application of the law of the case rule, and the underlying issue does not warrant review by this Court.

1. There is no merit to petitioners' contention (Pet. 22-24) that, because the Ninth Circuit's decision in *Ashkenazy II* denied the union's motion to compel compliance with *Felbro*, that decision is not the law of the case.

As the Ninth Circuit's opinion made clear, the court denied the motion only because the General Counsel agreed to be bound by *Felbro* in this case. Pet. App. 60-61. The court left no doubt that it was prepared to compel compliance in the absence of that commitment. Indeed, the court expressed dissatisfaction with the limited scope of the General Counsel's acquiescence in *Felbro* and declared itself ready to fashion a remedy for any future "violation of the rule of law." *Id.* at 61. There was no doubt that the Board was required to apply *Felbro* to this case. The Board and the D.C. Circuit were fully justified, therefore, in treating this decision as an authoritative ruling on the question presented.

The fact that the General Counsel altered his prior position when he agreed to abide by *Felbro* does not undercut the applicability of the law of the case rule. It was not unreasonable for the General Counsel to agree to honor the established law of the Ninth Circuit, rather than attempt to persuade that circuit to change its view and, failing that, to seek review in this Court. See *United Steelworkers* v. *NLRB*, 377 F.2d 140, 141 (D.C. Cir. 1966) ("certainly [this court] cannot hold the Board to have been in error when it decided to follow a decision of a Court of Appeals, especially of the circuit in which the relevant affairs occurred"). In any event, whether the D.C. Circuit correctly applied the law of the case rule to the unusual facts of this case is not an issue warranting review by this Court.

2. A court of appeals' adherence to the law of the case rule does not insulate the underlying issue from this Court's review. *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817-818 (1988). The correctness of the backpay award entered against petitioners, however, does not present a question warranting this Court's attention.

In *Sure-Tan*, the Board determined that the employer had committed an unfair labor practice when, after its employees had elected a union to act as their bargaining representative,

it sent a letter asking the INS to investigate the employees' immigration status. Nevertheless, the employer's request triggered an investigation, and five of the employees voluntarily left the country to avoid deportation. This Court held that, although they were undocumented aliens, those five individuals were "employees" within the meaning of the statute, and it sustained the Board's unfair labor practice determination. In addressing the remedies available to the five employees, however, the Court held that "the implementation of the Board's traditional remedies * * * must be conditioned upon the employees' legal readmittance to the United States." 467 U.S. at 902-903. "By conditioning * * * offers of reinstatement on the employees' legal reentry," the Court explained, the Board would avoid a conflict with the objective of the Immigration and Naturalization Act, 8 U.S.C. 1101 *et seq.*, which is to "deter unauthorized entry." Similarly, the Court stated that "in computing backpay, the employees must be deemed 'unavailable' for work (and the accrual of backpay therefore tolled) during any period when they were not lawfully entitled to be present in the United States." 467 U.S. at 903.

The courts of appeals have uniformly read *Sure-Tan* to permit awards of backpay to undocumented aliens who, unlike the employees in *Sure-Tan*, remain in this country during the backpay period.[3] In *Felbro*, the Ninth Circuit explained that the rationale of *Sure-Tan* does not extend

---

[3] The Court's opinion in *Sure-Tan* provides support for that view. For instance, when the Court reversed the Seventh Circuit's award of six months' backpay to the absent employees because the award was not based on evidence of any actual loss, the Court indicated that a different result might have been justified by "evidence * * * as to the period of time these particular employees might have continued working before apprehension by the INS." 467 U.S. 902 n.11. Cf. *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1047-1048 n.4 (1984).

to undocumented aliens continuously present in this country; that undocumented aliens have been eligible for comparable relief under a variety of labor statutes; that denying the Board's traditional reinstatement and backpay remedies to undocumented employees would reduce employers' incentive to comply with the NLRA; that those remedies would not encourage unlawful entry into the United States; and that the Board was not well equipped to resolve complicated issues arising from the immigration laws. 795 F.2d at 719-720.

Other courts of appeals have reached the same conclusion regarding other statutes. See *Rios* v. *Enterprise Ass'n Steamfitters Local Union 638*, 860 F.2d 1168, 1173 (2d Cir. 1988) (in actions under Title VII, "undocumented workers who have remained in the country are eligible for backpay as of the time of a violation"); *Patel* v. *Quality Inn South*, 846 F.2d 700, 705 & n.6 (11th Cir. 1988) (undocumented workers are not precluded from receiving backpay awards under the Fair Labor Standards Act of 1938 for periods they were present in the country), cert. denied, 489 U.S. 1011 (1989). See also *EEOC* v. *Hacienda Hotel*, 881 F.2d 1504, 1516-1517 (9th Cir. 1989); *Bevles Co.* v. *Teamsters Local 986*, 791 F.2d 1391 (9th Cir. 1986), cert. denied, 484 U.S. 985 (1987). We are aware of no decision that reached a different conclusion.

In the immediate aftermath of *Sure-Tan*, the Board insisted upon a showing that undocumented aliens were lawfully present in the United States as a condition to an award of backpay. *Felbro, Inc.*, 274 N.L.R.B. 1268 (1985), rev'd in relevant part, 795 F.2d 705 (9th Cir. 1986); *Caamano Bros.*, 275 N.L.R.B. 205, 205 n.1 (1985). The regional director followed that approach when he began to prepare the backpay specification in this case. In 1988, however, the General Counsel outlined a modified approach to backpay awards to undocumented aliens. In her Memo-

randum No. GC 88-9 (Oct. 27, 1987), the General Counsel concluded that, with respect to aliens employed before November 6, 1986, the effective date of the IRCA, the employer should bear the burden of proving that backpay claimants were not lawfully entitled to be present in the United States. Furthermore, this burden may be met only through a proffer of a final INS determination to that effect.[4] The Board recently approved the approach outlined in the General Counsel's memorandum. *Del Ray Tortilleria, Inc.*, 302 N.L.R.B. No. 45 (Mar. 27, 1991), slip op. 7-13 ("Respondent, as the party challenging the employees' entitlement to reinstatement and backpay, should bear the burden of proving their ineligibility by producing evidence that they are subject to an INS deportation order.").

All of the employees whose backpay is at issue in this case were employed prior to the effective date of the Immigration Reform and Control Act. See Pet. App. 22-23 n.1. Petitioners have not suggested that the INS has determined that any of the employees were subject to deportation during the backpay period. Consequently, under the standards presently being applied by the Board and all of the courts of appeals that have considered the issue, petitioners' allegation that some of the employees may not have been lawfully present in this country during the backpay period is not a defense to the award of backpay.[5] There is no

---

[4] With respect to employees hired after November 6, 1986, the General Counsel's memorandum would dictate the same approach, with one addition. Employees who failed to submit a valid "Form I-9" (see 8 C.F.R. 274a.2) verifying their eligibility for employment would not be entitled to reinstatement, and backpay would be withheld for the period that they were unwilling or unable to complete the form. The Board has not considered the remedies available to this category of employees.

[5] That result is not contrary to this Court's holding in *Sure-Tan*. As the administrative law judge noted, petitioners were "permitted to

conflict among the courts of appeals on this issue and no other ground warranting review by this Court.

3. Contrary to petitioner's contention (Pet. 18), the Immigration Reform and Control Act is inapplicable to this case. The IRCA makes it unlawful for an employer to knowingly hire or continue to employ "unauthorized aliens," and it imposes an obligation on employers, enforceable by means of criminal and civil penalties, to verify a prospective employee's right to work in this country. 8 U.S.C. 1324a(a). The IRCA's prohibitions on the employment of unauthorized aliens do not apply, however, to the "continuing employment of an alien who was hired before" November 6, 1986. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, Title I, § 101(a)(3)(B), 100 Stat. 3372. As the Board noted, the employees at issue here were hired prior to that date. Pet. App. 22-23 n.1. The IRCA thus imposes no restriction on the remedies available in this case. Cf. *Rios* v. *Enterprise Ass'n Steamfitters Local 638*, 860 F.2d at 1172-1173 & n.2; *EEOC* v. *Hacienda Hotel*, 881 F.2d at 1517 n.11. The inapplicability of the IRCA is a factor counseling against review by this Court, since cases involving employees hired before the effective date of the Act will become increasingly uncommon.

---

inquire, in order to determine the discriminatees' continued availability for work, whether they [had] been outside of the United States during any portion of the backpay period." Pet. App. 34-35. The one employee who testified that he was outside the United States for some part of the backpay period, Alberto Cayetano, was not awarded backpay for that time. *Id.* at 39-40. Thus, no employee was awarded backpay for a period that he was outside the country.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

LAURENCE S. ZAKSON
Attorney
National Labor Relations Board

MAY 1991

☆ U.S. GOVERNMENT PRINTING OFFICE: 1991—282-061/20057